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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 221

CLARENCE GOIN,

Petitioner,

No. 8942. *vs.*

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petitioner, Clarence Goin, respectfully petitions that Writ of Certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered after rehearing on the 24th day of May, 1946, affirming the judgment of the District Court of the United States for the Southern District of Indiana, entered the 9th day of October, 1945.

The opinion of the United States Circuit Court of Appeals affirming said judgment, filed May 9, 1946, and the

opinion on rehearing, filed on the 24th day of May, 1946, are set out in the record (Tr., pp. 39-42, and p. 54), and are not yet reported.

I.

Summary and Short Statement of the Matter Involved.

The petitioner was charged by a grand jury indictment in the United States District Court for the Southern District of Indiana with buying goods stolen from an interstate shipment. (Tr. pp. 1, 2.) Plea of not guilty was entered (Tr. p. 3) and trial was had upon said indictment before a jury, which returned a verdict of guilty as to said petitioner. (Tr. p. 20.) Judgment was entered by the District Court upon such verdict, that the petitioner, Clarence Goin, be imprisoned and confined for a period of four years. (Tr. p. 20.) Notice of appeal to the United States Circuit Court of Appeals for the Seventh Circuit was duly given and filed (Tr. pp. 21, 22), and thereafter within the time allowed by law, assignment of errors was filed (Tr. pp. 23, 24), questioning the sufficiency and weight of evidence to sustain the conviction. Said appeal was determined by the United States Circuit Court of Appeals on May 9, 1946, at which time said Court entered its written opinion affirming the judgment of the District Court, Major, Circuit Judge, dissenting. (Tr. pp. 39-42.) That thereafter, on the 15th day of May, 1946, said petitioner filed in said United States Circuit Court of Appeals his petition for a rehearing. (Tr. pp. 43-47.) Upon said 15th day of May, 1946, said petitioner filed in said Court his petition for a stay of mandate. (Tr. pp. 48, 49.) That on the 21st day of May, 1946, the respondent filed in said Court its answer to petitioner's petition for rehearing. (Tr. pp. 50-53.) That thereafter on the 24th day of May,

1946, the United States Circuit Court of Appeals entered an order modifying its written opinion filed May 9th, 1946, and denying this petitioner's petition for a rehearing in this cause. (Tr. p. 54.) That thereafter on the 25th day of May, 1946, the United States Circuit Court of Appeals sustained petitioner's motion for a stay of mandate in this cause, pursuant to Rule 25 of said Court. (Tr. p. 55.)

It is to be observed that petitioner did not move for a directed verdict in the trial court, but he sought a review by the United States Circuit Court of Appeals for the Seventh Circuit of the entire record upon the proposition that there was such a lack of evidence in this cause as to make the conviction of the petitioner a miscarriage of justice. It is also to be observed that the petitioner, Clarence Goin, was represented in the trial court by counsel other than those now appearing for said petitioner.

The indictment (Tr. p. 2) specifically charges the petitioner with the purchase of twelve cases of Golden Wedding whiskey, the same being an interstate shipment of freight, having been consigned by Schenley Distillers Corporation, Louisville, Kentucky, to King Klein, doing business as Shelby Liquors, at Memphis, Tennessee, knowing the same to have been stolen.

The evidence before the trial court discloses the following:

In July, 1945, Schenley's Distillers Corporation, Lawrenceburg, Indiana, shipped 430 cases of Golden Wedding Whiskey to King Klein d/b/a Shelby Liquors at Memphis, Tennessee. The same was routed out of Lawrenceburg via C. L. & A. Truck Lines. The price was $26.42 per case, including $9.00 per gallon Federal tax. (Tr. 5.) The wholesale price in Indiana was slightly higher than $28.52. The Shelby Liquors did not receive but 418 cases of the fore-

going. (Tr. 6.) On July 24, 1945, Mack's Motor Freight Line, Evansville, Indiana, received the shipment above referred to, of 430 cases, from C. L. & A at Lawrenceburg, Indiana. Their record reflects that they brought this shipment direct from Cincinnati to Evansville. Walter Cunningham, their manager, testified: "I say Cincinnati. I just don't know. It was not routed through Louisville, Kentucky." During the morning of July 25 said place of business was burglarized and a check revealed 12 cases missing. (Tr. 7.)

The 12 cases of Golden Wedding Whiskey were stolen from Mack's Motor Freight depot by Talbert Beasley, George Stearsman, Arlan Rhodes and a fourth person on the date in question. An attempt was made to sell same to one Lindsay Powell, who would not buy it. Stearsman and Rhodes, who had pled guilty in the District Court to the theft of this whiskey went out to the 400 block on Lincoln Avenue in Evansville, described as the place of business of the petitioner, Goin. (Tr. 8.) Stearsman left Rhodes in the car with the whiskey, and went inside and told the petitioner, Goin that he had some whiskey he had gotten in Peoria, Illinois. Goin asked him how much he wanted for it, and if it was hot. (Tr. 9.) Stearsman told him it was not hot, that he had bought it and wanted to make a small profit. Stearsman said he had given $35.00 per case for it. Goin agreed to pay $40.00. Goin said he would have to take their car and personally unload it. He took the car and came back in about 20 minutes and paid the amount agreed upon, $450.00 in cash. (Tr. 10.) No conversation was had regarding the sale of the whiskey in the presence of Rhodes. (Tr. 8) Stearman had not known Goin previously. (Tr. 10.) The money was paid in the presence of Rhodes. (Tr. 8.) Stearsman, about 30 days after the sale in question, sold Goin $60.00 worth of mer-

chandise consisting of liquor stolen from the Massey Liquor Store. (Tr. 10.) The place occupied by Goin upstairs consisted of living quarters in front, a little room in the middle where Goin had his bar, and a back room where he had his crap table. (Tr. 11.)

M. A. Johnson, a director of trade relations, Alcoholic Beverage Commission of Indiana, testified that Clarence Goin did not have a permit authorizing him to deal in whiskey, and under State law, could not have purchased more than one gallon of whiskey for his own use. (Tr. 12, 13.)

II.

Basis Upon Which It Is Contended That the Supreme Court Has Jurisdiction to Review the Judgment in Question.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended. 28 U.S.C.A. 347.

This petition is directed to the sound judicial discretion of the Supreme Court for the reason that the United States Circuit Court of Appeals has (a) decided an important question of federal law, which has not been, but which should be settled by the Supreme Court of the United States, and (b) has decided a federal question in such a way as to be in conflict with the applicable decisions of the Supreme Court.

The petition for rehearing in this cause was determined by the United States Circuit Court of Appeals for the Seventh Circuit upon the 24th day of May, 1946, the opinion affirming the judgment of the United States District Court for the Southern District of Indiana, having been entered upon the 9th day of May, 1946.

III.

The Questions Presented.

This petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit questions the correctness of their decision and judgment in this cause of action, whereby the decision and judgment of the United States District Court for the Southern District of Indiana was affirmed. The petitioner herein takes the position that said decision of the United States Circuit Court of Appeals for the Seventh Circuit is erroneous in that it sustains his conviction, despite the fact that there is an insufficiency of evidence to sustain the conviction, and that the Supreme Court of the United States, upon authority of *Johnson* v. *United States*, 318 U. S. 189; 87 L. Ed. 704, 63 S. Ct. 549, affirming C. C. A. (3); 129 Fed. 2nd, 954; 144 A. L. R. 182, may of its own motion take notice of said error, despite the failure of petitioner to move for a peremptory instruction in the trial court, for the reason that said judgment of conviction, if permitted to stand, would seriously affect the fairness, integrity or public reputation of judicial proceedings.

IV.

The Reasons Relied Upon for the Allowance of the Writ.

The Writ of Certiorari as herein prayed should be granted for the reason that the United States Circuit Court of Appeals for the Seventh Circuit has erroneously decided an important question of federal law and has decided a federal question in such a way as to be in conflict with the applicable decisions of the Supreme Court. The petitioner stands convicted in a cause in which there is an insufficiency of evidence to sustain the conviction.

Despite his failure to interpose a timely objection in the trial court, the Supreme Court of the United States has the power to take notice of errors so obvious on the face of the record as here presented, and enter a reversal of the cause for the reason that the fairness, integrity or public reputation of judicial proceedings is involved.

WHEREFORE, the petitioner herein respectfully prays that a Writ of Certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, to the end that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be reviewed and reversed by this Honorable Court.

Respectfully submitted,

CLARENCE GOIN,
Petitioner,

By THEODORE LOCKYEAR,
ELMER Q. LOCKYEAR,
PAUL WEVER,
Attorneys for Petitioner.

Dated at Evansville, Indiana,
June 19, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

CLARENCE GOIN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I.

The Opinion.

The petitioner herein, by petition for writ of certiorari, seeks a review of a judgment and opinion of the United States Circuit Court of Appeals for the Seventh Circuit, which judgment and opinion was filed May 9, 1946, and the opinion on rehearing filed on the 24th day of May, 1946, and are set out in the Record (Tr. pp. 39-42 and p. 54), and are not yet reported.

II.

Statement of the Grounds on Which the Jurisdiction of the United States Supreme Court Is Invoked.

This statement is set out in the preceding petition under that part of same denominated "II. Basis Upon Which It Is Contended that the Supreme Court Has Jurisdiction to Review the Judgment in Question", page 5 of same, which is hereby adopted and made a part of this brief by reference.

III.

Statement of the Case.

A concise statement of the case, containing all that is material to a consideration of the questions presented is set out in the preceding petition under that part denominated "I. Summary and Short Statement of the Matter Involved", pages 2 to 5 of same, which is hereby adopted and made a part of this brief by reference.

IV.

Specification of the Error Intended to Be Urged.

This specification is set out in the preceding petition under that part denominated "III. The Questions Presented", page 6 of same, which is hereby adopted and made a part of this brief by refernce.

V.

Argument.

Summary of the Argument.

(a) The entire record in this cause reveals such a lack of evidence as to make the conviction of the petitioner a miscarriage of justice. The United States Supreme Court has power to review the entire record, regardless of the condition of same, including the failure of petitioner to move for a directed verdict and to enter a reversal of this cause.

(b) It was incumbent upon the Government in the trial of this cause to prove petitioner received the whiskey in question, knowing it to have been stolen. It is not *per se* criminal to receive stolen property. Failure to show that Goin, beyond all reasonable doubt, knew the property to have been stolen, entitled the petitioner to an acquittal.

(c) The Circuit Court of Appeals in its original opinion, erroneously interpreted the case of *U. S.* v. *Atkinson* (1936), 297 U. S. 157, 160; 57 S. Ct. 391, 392; 80 L. Ed. 555, and upon petition for a rehearing, instead of correcting their judgment to conform to this precedent of the Supreme Court, they modified their opinion by omitting reference to this citation.

ARGUMENT.

This Court is fully authorized to review the record in this case and determine this issue of the sufficiency of the evidence. In this respect, the petitioner calls the attention of the Court to the opinion of Chief Justice Stone in *U. S.* v. *Atkinson* (1936), 297 U. S. 157, 160; 56 S. Ct. 391, 392; 80 L. Ed. 555:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."

This rule has been specifically applied in cases in which there was no request that the jury be directed by the trial court to acquit the defendant. For example, see the case of *Sykes* v. *U. S.* (1913), 204 Fed. 909, 913, 914; 123 C. C. A. 205, 209, wherein the court made this observation:

> "To escape from the effect of this conclusion, counsel challenge our attention to the fact that no request for a peremptory instruction to return a verdict for Sykes was made at the trial, and invoke the conceded rule that the court may not review the existence of evidence to sustain a verdict, in the absence of a request after the close of the evidence for a peremptory instruction. * * * But there is an exception to this general rule which has been made to prevent just such gross injustice as would result from the punishment of the defendant Sykes upon the evidence which has been recited. It is that in criminal cases, where the life, or as in this case the liberty, of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may notice such a grave

> error as his conviction without evidence to support it, although the question it presents was not properly raised in the trial court by request, objection, exception, or assignment of error."

The Court's attention is also called to the case of *Crawford* v. *U. S.* (1908), 212 U. S. 183, 194; 53 L. Ed. 465; 29 S. Ct. 260, 264:

> "In criminal cases courts are not inclined to be as exacting with reference to the specific character of the objection made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception."

The Court's attention is also called to the case of *Wiborg et al.* v. *U. S.* (1896), 163 U. S. 632, 659; 16 S. Ct. 1127, 1137; 41 L. Ed. 289, 299:

> "And, although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."

Better practice would have required in this cause a motion for a peremptory instruction and petitioner makes this frank statement in the same sincerity that he urges a reversal of this cause by reason of his innocence. This Court nevertheless has a right to review the record in this case and determine this issue.

Other cases sustaining the position of the petitioner in this respect are as follows:

> *Johnson* v. *U. S.* (1943), 318 U. S. 189, 200; 63 S. Ct. 549, 555; 87 L. Ed. 704.
>
> *Feinberg* v. *U. S.* (1924), 2 Fed. 2d, 955, 956, 957 (C. C. A.).

Gillette v. *U. S.* (1916), 236 Fed. 215, 218; 149 C. C. A. 405.

Wright v. *U. S.* (1915), 227 Fed. 855, 857; 142 C. C. A. 379, 381.

The government's failure to establish the guilt of this petitioner rests almost totally upon their failure to establish that the petitioner had knowledge that these 12 cases of whiskey which he purchased were stolen merchandise. Upon this issue the burden of proof rested upon the government to establish the fact of his knowledge beyond all reasonable doubt. Mere suspicion is not enough. In a case in which the proof against a defendant was much stronger than in the instant cause, the Court stated:

> "It is not *per se* criminal to receive stolen property. The crime consists in receiving it, knowing it to have been stolen. It is not admissible to introduce evidence which merely shows that the accused had in his possession other stolen property. The possession of stolen goods, where the possessor is not charged with their larceny, is regarded as innocent, unless shown to have been received with knowledge that they were stolen, or under circumstances which would satisfy the jury that the possessor believed them to be stolen."
>
> *Wolf* v. *U. S.* (1923), 290 Fed. 738, 744 (C. C. A.).

The petitioner cites the court to the case of *Gargotta* v. *United States* (1935), 77 Fed. 2d, 977, 981, 983, 984:

> "The defendant is presumed to be innocent, and this presumption is a real presumption in his favor which abides with him at every stage of the trial. The burden of proof was on the government to prove his guilt beyond a reasonable doubt. No principles of criminal law are more firmly fixed than these. They have been proclaimed by every court of record throughout the land. They go to the very basis of our liberties. * * *
>
> "This court has frequently announced and commit-

ted itself to the rule: 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the plaintiffs in error.' * * *

"The cases relied upon by the government as authority for its contention that the fact of possession standing alone is some evidence to be considered with all the other facts are cases where the other evidence or circumstances relied upon are of an entirely different nature, and upon examination will disclose that there was inconsistent statement, attempt to conceal, an attempt to sell for less than the fair value, spoliation, fabrication, suppression of evidence, or contradictory explanations of the possession, all of which are entirely absent in the case at bar. * * *

"The circumstances relied upon, that the defendant was found in possession of the pistols, that they had stamped thereon the words 'United States Property', we believe are just as consistent with the innocence of the defendant as with his guilt in this case, and we have been unable to find substantial evidence of fact which excludes every other hypothesis than that of guilt. * * *

"After a careful study of the authorities, and a scrutiny of the evidence, we are unable to divest our minds of the conclusion that there was not sufficient evidence of guilt of the defendant to sustain the verdict."

The United States Circuit Court of Appeals for the Seventh Circuit, in *Caringella* v. *U. S.* (1935), 78 Fed. 2d, 563, 566, said:

"Suppositions are not sufficient to support a conviction."

The same court also said in the case of *Cherry* v. *U. S.* (1935), 78 Fed. 2d, 334, 336:

> "There must be at least some suggestions that a buyer knows a seller is disposing of stolen goods before the buyer can be held in a criminal action to have participated in the crime."

The evidence in this cause discloses that the witness, Stearsman, approached the petitioner, Goin, offering him 12 cases of whiskey for sale. Goin immediately asked him if they were hot, and was assured that they were not. Stearsman assured him that he had purchased them in Peoria, at $35.00 per case, and wanted to make a small profit. Goin paid them the equivalent of $40.00 per case, or $450.00 in all, an amount in excess of the wholesale price established by a government witness. He paid this sum in cash. Stearsman was not previously acquainted with the petitioner. Petitioner respectfully submits that the foregoing explanation of his possession of this stolen merchandise is as consistent with a hypothesis of innocence as with his guilt. This was all the competent evidence against him. True, there was evidence that some 30 days later, he purchased $60.00 in merchandise from Stearsman. It is doubtful if this evidence was competent. Does it not, however, emphasize that Goin considered the first transaction legitimate, for there is an absence of evidence in respect to the last transaction on the subject of his knowledge of the stolen character of that merchandise. Assuming for the sake of this argument, that Goin was not licensed to purchase this whiskey, that at most would be a violation of the law of the State of Indiana. It would not shed light on the controlling question of this case, his knowledge respecting the stolen character of this whiskey, an issue which the government has totally failed to sustain by the evidence.

The following additional citations sustain the petitioner in this respect.

68 A. L. R. 187.
105 A. L. R. 1289.
147 A. L. R. 1066.
Stemple v. *U. S.* (1923; C. C. A. 4th), 287 Fed. 132.
Pounds v. *U. S.* (1920; C. C. A. 7th), 265 Fed. 242.
Kasle v. *U. S.* (1916; C. C. A. 6th), 233 Fed. 878.

The United States Circuit Court of Appeals in its original opinion in this cause, by Mr. Justice Minton, erroneously quotes from the opinion of Mr. Chief Justice Stone, in *U. S.* v. *Atkinson, supra,* and interposes the word "and" instead of the word "or" in quoting from that portion of the opinion which states:

> "Appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings."

By his petition for rehearing petitioner called the attention of the United States Circuit Court of Appeals to the fact that that court had erroneously quoted and interpreted the case of *U. S.* v. *Atkinson, supra,* and pointed out to the Circuit Court of Appeals that the test to be applied is whether or not the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. Upon petition for rehearing, and upon the 24th day of May, 1946, the Circuit Court of Appeals entered an order modifying its written opinion by eliminating from their said opinion the language which they had erroneously quoted from the opinion in *U. S.* v. *Atkinson, supra,* and entered an order denying the petition for rehearing. The petitioner does not criticise the Circuit Court of Appeals for eliminating language from their

opinion which is a mistaken quotation from an opinion of the Supreme Court of the United States. He does, however, question the correctness of that court's opinion with this erroneous quotation eliminated, and respectfully urges that the foregoing statement of facts justifies the Supreme Court of the United States in granting the petition for Writ of Certiorari as herein prayed.

The petitioner was not guilty merely because an indictment was returned against him. The burden was upon the Government to establish his guilt beyond mere suspicion. Upon the basis of the record in this cause, Goin was entitled to an acquittal in the District Court. He was entitled to a reversal in the Circuit Court of Appeals. He respectfully submits that the Petition for Writ of Certiorari as herein prayed should be granted.

Respectfully submitted,

CLARENCE GOIN,

Petitioner,

By THEODORE LOCKYEAR,
ELMER Q. LOCKYEAR,
PAUL WEVER,
Attorneys for Petitioner.

Dated at Evansville, Indiana,
June 19, 1946.

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CITATIONS

703405—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 221

CLARENCE GOIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority opinion in the circuit court of appeals (R. 39–41, 54) has not yet been reported.[1]

JURISDICTION

The judgment of the circuit court of appeals was entered May 9, 1946 (R. 42), and a petition for rehearing was denied May 24, 1946 (R. 54).[2]

[1] In its opinion the court below disposed of the appeals in three cases. The dissenting opinion (R. 41) concerns only the appellant Rushell Bailey who was not indicted or tried with petitioner, and who is not a petitioner in this case.

[2] The court's order of May 24, 1946, as reproduced at R. 54, does not indicate that the petition for rehearing was denied when the opinion affirming petitioner's conviction was modi-

The petition for a writ of certiorari was filed June 20, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTION PRESENTED

Whether petitioner's conviction should be reversed on the grounds that there was insufficient evidence to support the verdict of guilty.

STATEMENT

Petitioner was charged in a one-count indictment returned in the United States District Court for the Southern District of Indiana with buying and receiving twelve cases of whiskey that had been stolen from an interstate shipment, knowing that they had been stolen (18 U. S. C. 409).[3] After a jury trial, at which he was represented by counsel (R. 4–18), he was found guilty as charged and was sentenced to imprisonment for four years (R. 20). On appeal to the Circuit Court of Appeals for the Seventh Circuit his conviction was affirmed (R. 42).

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fied. But the petition for rehearing was filed on behalf of Goin, as well as appellants Powell and Bailey (R. 43); and the court's order of May 24, 1946, as reproduced at R. 70 in Nos. 219–220, this Term, filed by Powell and Bailey, indicates that the last sentence of the order reads as follows:

"It is further ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied."

[3] This statute is quoted in the Government's brief in Nos. 219–220, this Term, at p. 2.

The evidence for the Government is set forth in the Argument, *infra.*

ARGUMENT

Relying principally upon *United States* v. *Atkinson,* 297 U. S. 157,[4] petitioner, who failed to challenge the sufficiency of the evidence at any stage of the proceedings in the trial court, contends here, as he did in the circuit court of appeals, that his conviction should be reversed because "there was such a lack of evidence as to make" his conviction "a miscarriage of justice" (Pet. 6–7, 11, 14–17). This contention is without merit.

There was ample uncontradicted evidence to sustain the jury's verdict;[5] it may be summarized as follows:

At about daybreak on the morning of July 25, 1945, twelve cases of fifths of Golden Wedding whiskey—part of a shipment of 430 cases en route from Lawrenceburg, Indiana, to Memphis, Tennessee—were stolen from a freight depot in Evansville, Indiana, by Arlan L. Rhodes, Talbert Beasley and George L. Stearsman. Rhodes and Stearsman took the whiskey in a 1937 Plymouth

[4] "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson,* 297 U. S. 157, 160.

[5] Petitioner did not testify, and offered no evidence in his defense.

sedan almost directly[6] to the home of petitioner, who Stearsman had heard was a bootlegger. Petitioner had his living quarters in the front room on the second floor of the house; he had a bar, and tables, in the middle room where he sold drinks; and in the back room he had a table set up for shooting craps. Stearsman told petitioner he had in his car, which was parked outside, twelve cases of whiskey which he had bought in Peoria for $35 a case and wanted to make a small profit on it. Petitioner asked if it was "hot" and Stearsman replied that it was not. Petitioner then agreed to pay $40 per case for it, and said: "I will have to take your car and unload it." Thereupon Stearsman and Rhodes waited at petitioner's house, having a few drinks in the middle room while petitioner drove off with the car and the whiskey. Fifteen minutes later petitioner returned the car, empty, turned over the keys to Stearsman, and then paid $450 for the whiskey. (R. 8–11.) Three or four weeks later petitioner purchased from Stearsman, for $60, twenty-one cases of whiskey, wines, etc., which Stearsman had stolen from a liquor store (R. 10). After petitioner was arrested, two empty bottles bearing Golden Wedding whiskey labels similar to those in the shipment from which the twelve cases were stolen were found in an ash pit behind petitioner's

[6] They tried first to sell it to Lindsay Powell (petitioner in this Court for a writ of certiorari in No. 219, O. T. 1946) but Powell said he could not use it; he had too much (R. 8, 9).

premises (R. 5, 11). There was also testimony that at the time petitioner agreed to pay $40 per case for the whiskey the wholesale price for it in Indiana, including the State tax and exclusive of transportation charges, was $28.52 (R. 6); and that petitioner had no State permit for the purchase of whiskey and, therefore, was only entitled to purchase whiskey for his own use which limited him to one gallon at a time [7] (R. 12–13).

Although there was no direct showing that petitioner knew the whiskey had been stolen, the circumstances under which he acquired it clearly warranted the jury's finding that he did know Stearsman and Rhodes were disposing of stolen goods.[8] He made the unauthorized purchase in the

[7] One case of 12 fifths contains 2.4 gallons (R. 13).

[8] The jury's attention was called to the fact that this was the only element of the crime as to which there was no direct evidence. The court charged as follows (R. 16–18):

"It isn't necessary that the defendant know that the merchandise was moving in interstate commerce at the time it was stolen. That is not necessary, where one receives stolen property. But the only thing that he is required to know is that it was stolen property.

"Now, that is the question, and seems to be the only question in this case. The evidence is uncontradicted that this merchandise was moving in interstate commerce at the time it was stolen. The ones who did the stealing told you that they stole the property, or the merchandise, from this warehouse while it was in interstate commerce. Therefore, the only question for you to determine, and if you believe the uncontradicted evidence in this case, there is no question but what this defendant did buy and receive that particular merchandise, it is down to one question for you to determine, whether or not at the time he bought it, he knew that the

early hours of the morning, for cash, for a price which was in excess of the market price for a bona fide transaction, without examining the whiskey or inquiring as to whether it bore tax stamps; and he

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property was stolen. That is the only question, it seems, that is controverted in this case.

"Now, there is no oral testimony, direct testimony, that he knew it, but you must understand that circumstantial evidence is legal evidence. Sometimes it is more convincing than oral testimony. So in determining that question, the intent on his part, that is, that he knew this property was stolen, consider the circumstances, the manner in which the sale was made, the conduct of the parties, paid for in cash, and all of those things in determining the one question, whether or not he knew this property was stolen. The fact that he asked whether or not it was hot. That is the question for you to determine.

"There is some evidence here that he had another deal, another transaction, with one of these same persons following this transaction. He is not on trial for that transaction; that was only competent to determine and to help you to determine his intent in buying this property, whether or not he did know that it was stolen property. Now, we are not trying at this time these persons who stole the property, and the fact they have plead guilty in this case, to having stolen this property in interstate shipment, come here and testified, that particular fact must not be considered by you in determining this question of whether or not the defendant did buy this property knowing that the same was stolen. He is not on trial for violating the state law, in buying merchandise without a permit. That is not in this case excepting as it might go to assist you in determining the type of person with whom you are dealing. That is the only place that that evidence has in this particular case.

* * * * *

"If the Government depends entirely on circumstantial evidence; to prove the guilty knowledge of the defendant, such evidence must point so conclusively to the guilt of the defendant that you can arrive at no other conclusion."

unloaded it himself, apparently being unwilling to reveal to the others where he stored the supplies for the illicit business he was carrying on in the second floor bar at his home.

It is manifest, we believe, that the evidence fully supports the verdict,[9] and that a review of the evidence by the court below would not have changed that court's conclusion affirming petitioner's conviction. The assertion (Pet. 11) that "the entire record in this cause reveals such a lack of evidence as to make the conviction of the petitioner a miscarriage of justice" is clearly without merit.

CONCLUSION

For the reasons stated we respectfully submit that the petition for a writ of certiorari should be denied.

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[9] The question is not, as petitioner argues (Pet. 11), whether the Government showed "that Goin, beyond all reasonable doubt, knew the property to have been stolen," but whether there was substantial evidence to support the verdict, it being for the jury to determine whether "the effect of the evidence was such as to overcome any reasonable doubt of guilt." *Pierce* v. *United States*, 252 U. S. 239, 251–252.

U. S. GOVERNMENT PRINTING OFFICE: 1946